SUPREME COURT, U. S.

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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 737

CHARLES E. CRAIG ——— *Petitioner*

v.

UNITED STATES OF AMERICA ——— *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
AND
## APPENDICES

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CHARLES E. CRAIG ..... *Petitioner*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AND

## APPENDICES

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The Petitioner, Charles E. Craig, by his counsel, Jack Holt, Jr., petitions this Court and prays that a writ of certiorari issue to review the Judgment of the Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Eastern District of Arkansas in which the petitioner was convicted for selling and dispensing drugs in a package without appropriate tax stamps and for selling a certain narcotic drug not pursuant to a written order.

## CITATIONS TO OPINIONS BELOW

The findings of the District Court, which were not reduced to formal opinion, were affirmed by the decision of the Court of Appeals for the Eighth Circuit (Appendix B, infra, p. 9) which has not been reported.

## JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on October 14, 1964. (Appendix B, infra, p. 15.) A petition for rehearing was timely filed by petitioner and was subsequently denied on November 5, 1964.

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A motion for stay of mandate pending this application for writ of certiorari was then presented to the Circuit Court of Appeals and was granted on November 12, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## QUESTIONS PRESENTED

(1) Should the trial court have ruled on the questions of entrapment as a matter of law.

(2) Did hearsay, prejudicial evidence and erroneous remarks of the Assistant District Attorney in closing argument substantially affect the rights of the petitioner.

(3) Was the petitioner entitled to an instruction on his affirmative defense of custodial possession and return of narcotic drugs.

## STATUTE INVOLVED

The statutory provisions are 26 U.S.C.A., Section 4704A; 26 U.S.C.A., Section 4705A. (Appendix A, infra p. 8.)

## STATEMENT

The petitioner was convicted in the District Court of the Eastern District of Arkansas on two (2) counts; Count I for selling and dispensing drugs in a package without tax stamps; and Count II for selling a certain narcotic drug not pursuant to a written order.

The jurisdiction of the District Court was invoked because the case arises under 26 U.S.C.A., Section 4704A, and 26 U.S.C.A., Section 4705A.

The circumstances of the crimes charged and resulting trial are set out briefly in the following particulars:

Burris, a paid informant gained an introduction to petitioner, then invited petitioner to join him and another individual, Moore, in a trip to Mississippi to obtain prescriptions for certain narcotic drugs and drugs.

Petitioner, upon request, gave informant Burris $500.00. Burris, Moore, and Petitioner drove to Mississippi. Upon arrival at their destination, Moore went into a doctor's home and procured a prescription, which was later filled. The next day, the petitioner went with Burris and Moore to another town in Mississippi where Moore obtained another prescription which was filled.

The informant Burris and Moore had been to Mississippi previously on two other drug hauls. The petitioner had not.

Burris, Moore and the petitioner then returned to Little Rock. Petitioner was disturbed as he had given informant Burris $500.00, yet had not been introduced to a source of drugs as a result of his travel.

Appellant then insisted that Burris leave one of the drugs procured as security for the money he had advanced. Burris agreed, gave the drugs to Petitioner and then caught an airplane for Hot Springs.

Approximately two hours later Burris returned to Little Rock and called Petitioner, stating that he had a friend, a safeman named Gaines, who needed 20 to 30 tablets for a sick whore friend. Gaines was later identified as Agent Snokhaus, Bureau of Narcotics.

Although petitioner told Burris not to bring his friend to his house, Burris and Agent Snokhaus went to the petitioner's home where Snokhaus attempted to bargain with the petitioner.

The petitioner states that he refused to sell any tablets, and that after insistence, he gave Burris 10 tablets provided Burris would replace them the next day, then refused payment.

Agent Snokhaus contends that he asked petitioner how much he wanted for them. The petitioner stated that they could straighten it up the next day. Snokhaus then replied that he was leaving town, then Appellant stated that twenty dollars would be a good price, which Snokhaus paid and then left.

Agent Snokhaus made two other attempts to buy drugs from petitioner, without success. Six months later petitioner was arrested.

During the course of trial the Assistant District Attorney introduced on several occasions vivid testimony of the petitioner's use and injections of drug, which were not in issue, then in closing argument, made an oration to the effect that the petitioner is not being tried for the crimes he committed in Mississippi.

At the conclusion of trial, the petitioner requested an instruction on his affirmative defense, a return rather than sale of drugs, which the Court refused.

Petitioner perfected an appeal, but on review the Circuit Court of Appeals affirmed the findings of the lower court concluding that entrapment as a matter of law should not be considered since the issue had not been raised in trial court; that the errors and inadvertent reference to appellant's use of narcotics did not have a substantial effect upon the jury verdict, and that the petitioner's contention that the informant Burris or Moore had some title or interest in the narcotics in the defendant's possession does not constitute a defense to the charges here made, and that the trial court properly refused to give Petitioner's instruction.

REASONS FOR GRANTING THE WRIT

(1) The strict decision of the Court of Appeals that the question of entrapment as a matter of law cannot be urged on appeal where such issue has not been raised in trial court denies the petitioner due process of law. The defense of entrapment, its meaning, purpose and application are problems encapable of determination by jury and should be properly viewed and ruled upon by the Court itself.

Although this Court, in the case of *Sherman* v. *United States*, 356 U.S. 369, and in *Masciale* v. *United States*, 356 U.S. 386, held that the issue of entrapment is a jury question, the Court should, in accordance with the views expressed in the concurring opinion in the Sherman case and dissent in the Masciale case, reconsider whether or not the Court should, itself, have ruled on the issue of entrapment and not left it for determination by the jury.

(2) The decision of the Circuit Court of Appeals is believed to be erroneous and conflicting with the prejudicial error test laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65.

It is particularly noted that the Circuit Court of Appeals apparently did not consider the erroneous and prejudicial statement of the United States Attorney in his closing argument.

Clearly, the factual question presented concerning the prejudicial evidence is of importance in the administration of justice and the rights of the accused petitioner.

(3) The rationale of the court below on the petitioner's right to an affirmative defense of possession of drugs for or on behalf of another is not supported by any decision of this Court and is void of support in either fact or logic.

Under the statutes in question, the pertinent criminal act of the Petitioner is whether or not the Petitioner did "purchase, sell, dispense or distribute certain narcotic drugs."

It is a general rule of law that criminal case instructions are erroneous if they exclude from the jury's consideration an affirmative defense as to which evidence has been received.

In this instance, evidence was received concerning the Petitioner's affirmative defense of possession for another and return, thus giving rise to an issue as to whether or not a return or partial return of drugs constituted selling, dispensing, or distributing drugs.

Thus, the failure to instruct on possession and return excluded from the jury the Petitioner's defense.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK HOLT, JR.
115 North State
Little Rock, Arkansas

*Counsel for Petitioner*

# APPENDIX A

## STATUTES

26 U.S.C.A. 4704 (a).

> *General Requirement.* — It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession the same may be found.

26 U.S.C.A. 4705 (a).

> *General Requirement.* — It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance to a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that person by the Secretary or his delegate.

# APPENDIX B

OPINIONS AND JUDGMENTS BELOW

## UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,554.
Charles E. Craig, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[October 14, 1964.]

Before VAN OOSTERHOUT and MEHAFFY, Circuit Judges, and DELEHANT, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Defendant Charles E. Craig appeals from his conviction upon each court of a two count indictment. Court I charges selling and dispensing narcotic drugs in or from a package not having appropriate tax stamp in violation of 26 U.S.C.A. § 4704(a). Count II charges selling the same drugs not in pursuance to a written order on a prescribed form in violation of 26 U.S.C.A. § 4705(a). Defendant was tried to a jury and found guilty on both counts. He was sentenced to five years imprisonment on Count II and two years imprisonment on Count I, said sentences to be served concurrently.

Defendant urges that he is entitled to reversal for the following reasons:

1. The defense of entrapment was established as a matter of law.

2. Prejudicial error in admitting hearsay evidence and other evidence.

3. Refusal to give requested instruction "A".

We deem it unnecessary to set forth the evidence in detail. While defendant's testimony conflicts with that of the Government witnesses in some respects, defendant does not challenge the sufficiency of the evidence to support his conviction upon both counts except with respect to the entrapment issue.

The short answer to defendant's contention that he is entitled to a reversal because he has established entrapment as a matter of law is that defendant did not raise such issue in the trial court. Defendant made no motion for acquittal upon this or any other ground. It is firmly established that the sufficiency of the evidence to support a conviction cannot be urged upon appeal where such issue has not been raised in the trial court. *Grant* v. *United States,* 9 Cir., 291 F. 2d 746, 748; *Middleton* v. *United States,* 4 Cir., 249 F. 2d 719, 720; *Wayne* v. *United States,* 8 Cir., 138 F. 2d 1, 2.

While an appellate court has a right to note plain error under criminal rule 52(b), such right should be exercised only in exceptional cases to avoid a clear miscarriage of justice. We find here no basis for invoking the plain error rule. We have examined the record and are satisfied that a fact issue was presented on the entrapment defense and that such issue was fairly submitted to the

jury upon proper instruction to which no exceptions were taken. Under such circumstances, "the jury's verdict of guilty is completely dispositive of the asserted defense." *Vineyard* v. *United States*, 8 Cir., 335 F. 2d 176, 183.

Defendant's contention that prejudicial errors were committed in the reception of certain evidence from Mr. Burris, the Government informer, is without merit. Burris testified in substance that he had been informer by a Mr. Clift that defendant was in the market for narcotics. This testimony was stricken on defendant's motion as hearsay and the jury was instructed immediately that such testimony should be disregarded. A motion for mistrial was denied. Moreover, defendant's testimony as a witness shows without question that he was in the market for narcotics. It is unlikely that the hearsay evidence which was promptly stricken had any effect upon the jury's verdict.

Defendant also urges that testimony by the informer to the effect that he saw the defendant take narcotic injections on several occasions was improperly admitted. Most of this testimony was received without objection. Some was brought out by examination by defendant's counsel. This evidence appears to be relevant on the entrapment issue. See *Neill* v. *United States*, 8 Cir., 225 F. 2d 174. After some such testimony had been received, defendant's counsel stated that his client was not being tried for taking a shot. The United States Attorney then stated the defense counsel opened the inquiry, whereupon the court stated:

> "Well, he said he took two shots. How he took them, I think is immaterial. The Jury understands I am sure. If not, I'll tell them. He is not charged with taking dope. He is charged with selling dope."

The United States Attorney offered a proper instruction limiting the effect of the evidence of other offenses. Defendant objected to the giving of such instruction and requested no limiting instruction.

We recently had occasion in *Evenson* v. *United States*, 8 Cir., 316 F. 2d 94, to collect the pertinent authorities to be applied with respect to determining whether prejudicial error has been committed in the reception of evidence. In that case, we held that when the prejudicial error test laid down in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, was applied, we found no prejudicial error, stating:

> "When consideration is given to the strong case made out by the Government, the rather brief, unemphasized reference to appellant's admission of his past record, the prompt and decisive action of the trial court in striking the evidence, and instructing the jury to disregard it, the trial court's appraisal to the effect upon the jury as reflected by his denial of the mistrial motion, and the record as a whole, we feel that we can say with reasonable assurance that the apparently inadvertent reference to appellant's past record did not have any substantial effect upon the jury's verdict." 316 F. 2d 94, 96.

What we said in *Evenson* fully applies to the errors here asserted.

Defendant as a witness admitted that he had made a trip from Little Rock, Arkansas, to Greenville and Marks, Mississippi, accompanied by Burris and George Moore, for the purpose of obtaining narcotics by means of doctor's prescription and for the purpose of making the acquaintance of doctors who would issue such prescrip-

tions. Defendant furnished $400 to finance the trip and purchases and the parties were successful in obtaining narcotics by means of prescription. Defendant did not participate in seeing the doctor and obtaining the prescription. He admits that he obtained possession of about seventy Dilaudide tablets. Ten of such tablets were involved in the sale charged in the indictment. Defendant sets out his version of the acquisition of possession of the narcotics as follows:

> "I said 'Well, let me hold that stuff that you got there for security. I ain't got no money, no medicine, no nothing. I better have something'. He said 'Well, I'll let you hold this dilaudide here, I've got a man who wants this other'. — I can't think of the name of him, anyway he said he had a man that wanted that, he said he would let me hold the dilaudide, so I had it."

Upon the basis of such testimony, defendant requested instruction "A" which in substance was designed to advise the jury that if defendant was holding the narcotics for another person and subsequently returned the narcotics to such person, he was not guilty of the offenses charged.

The indictment charges the defendant with unlawful sale to Snokhous. The court properly charged the jury with respect to the offenses charged. If, as defendant contends, the informer or Moore had some title or interest in the narcotics in the defendant's possession which defendant sold to Snokhous, such would not constitute a defense to the charges here made. The court properly refused to give the instruction.

*Graham v. United States*, 6 Cir., 257 F. 2d 724, is of no aid to the defendant. Said case is distinguishable in many respects. Among other things, the defendant there contended that he had no knowledge of the contents of the package left with him for safekeeping. The charge there was based on possession, not on sale as here.

We have fully considered all errors urged by the defendant. Our examination of the record convinces us that no prejudicial errors were committed by the trial court and that the defendant has had a fair trial.

The judgment appealed from is affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*
Filed Oct. 14, 1964, Robert Tucker, Clerk

JUDGMENT

## UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,554. September Term, 1964.
Charles E. Craig, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Charles E. Craig, do surrender himself to the custody of the United States Marshal for the Eastern District of Arkansas, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

October 14, 1964.

Order entered in accordance with

Opinion: —

Robert C. Tucker
Clerk, U. S. Court of Appeals
for the Eights Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17554. September Term, 1964.

Charles E. Craig, Appellant,

vs.

United States of America

Appeal from the United States District Court for the Eastern District of Arkansas.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 5, 1964.

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759-507—64

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 737

CHARLES E. CRAIG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. 9–14; R. IV, 1–6) [1] is reported at 337 F. 2d 28.

### JURISDICTION

The judgment of the court of appeals was entered on October 14, 1964 (Pet. 15; R. IV, 7), and a petition for a rehearing was denied on November 5, 1964 (Pet. 16; R. IV, 8–10). The petition for a writ of certiorari was filed on December 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in four volumes, which are referred to by their Roman numerals.

## QUESTIONS PRESENTED

1. Whether the defense of entrapment was established as a matter of law.

2. Whether the district court's admission of certain evidence or a statement in the prosecutor's closing argument constituted prejudicial error.

3. Whether the court erred in refusing to give an instruction with respect to the criminal liability of a person who holds narcotics on behalf of another.

## STATEMENT

Petitioner was charged under a two-count indictment in the United States District Court for the Eastern District of Arkansas with an unlawful narcotics sale on January 5, 1963, without an appropriate tax stamp and not in pursuance of a written order form, in violation of 26 U.S.C. 4704(a) and 4705(a) (R. I, 1–2). The jury found him guilty on both counts (R. I, 18), and the court imposed concurrent sentences of imprisonment for two years on count 1 and five years on count 2 (R. I, 19). On appeal (R. I, 20–21), the conviction was affirmed (Pet. 15; R. IV, 7).

The evidence at the trial may be summarized as follows:

Burris, a government informer (R. III, 85–86), testified that on January 4, 1963, he was introduced to petitioner by one Clift, in Hot Springs, Arkansas (R. II, 30). Petitioner said that he was interested in narcotics, and that he understood from Clift that Burris knew a party who could supply him. With money furnished by petitioner, Burris telephoned Moore, who then spoke on the telephone to petitioner (R. II, 32–33).

Later petitioner, Moore, and Burris went to Mississippi in petitioner's car (R. II, 33–34). Petitioner gave Moore $500 for the purchase of narcotics (R. II, 35, 47). On January 4 and 5, Moore obtained prescriptions from several doctors and purchased narcotics, most of which were dilaudide tablets, at various pharmacies (R. II, 36–37, 38–41, 70–73). Burris observed petitioner taking hypodermic shots in his hotel room and on the trip back to Little Rock (R. II, 38, 41).

On January 5, 1963, agent Snokhous instructed Burris to place a telephone call to petitioner to order narcotics (R. III, 80). At about 10:00 p.m., Burris telephoned petitioner at his home in Little Rock, and asked if he could supply a burglar friend named Gaines with 20 or 30 dilaudide tablets. Petitioner said that it was not good business to speak over the telephone (R. II, 13–14).

Burris and agent Snokhous drove in agent Dino's car to petitioner's home, where Dino observed the transaction from his car (R. II, 14, 15, 62–63; R. III, 81). When petitioner answered Burris' knock and came outside, Burris introduced agent Snokhous under the name of Jimmie Gaines as a "solid" person in the "underworld racket." Petitioner cautioned Burris about speaking over the telephone (R. II, 15–16; R. III, 82). When Snokhous asked if it was "cool" (safe) to deal out there, petitioner said that it was "all right." Petitioner placed a plastic bottle of tablets in Burris' shirt pocket (R. II, 16, 17; R. III, 82). When Burris asked the price, petitioner said that they could straighten it out the next day, but Snokhous

said that he preferred an immediate settlement since he was leaving that night (R. II, 17–18; R. III 82–83). After petitioner set $20 as a good price, Snokhous paid him with four five-dollar bills, the numbers of which had previously been recorded (R. II, 18; R. III, 83). When Snokhous said that he would buy more narcotics from petitioner on his next trip to the Little Rock area, petitioner answered, "That's all right, but don't call me on the telephone" (R. III, 84). Chemical analysis showed that the 10 tablets contained dilaudide hydrochloride (R. II, 59; R. III, 84). At the time of the sale there were no federal narcotics stamps on the package and no order form (R. III, 85).

In testifying on his own behalf petitioner said that he occasionally used narcotics but that he was not an addict (R. III, 94). On January 3, 1963, when Burris asked petitioner if he wanted to buy some narcotics, he replied that he did not want any bootleg stuff, but that he could use prescription stuff (R. III, 93–94). Petitioner testified that Burris promised that, if petitioner would lend him money to buy narcotics, Burris would introduce him to some doctors so that petitioner could obtain his own prescriptions (R. III, 94). Upon their return from the Mississippi trip petitioner complained that he had not been introduced to any doctors (R. III, 100), and said "Well, let me hold that stuff that you got there for security. I ain't got no money, no medicine, no nothing. I better have something." Burris then agreed to let petitioner hold the dilaudide. Petitioner said that he kept the bottle containing 70 dilaudide tablets as

security for the loan he had made to Burris, who promised to introduce him to some doctors the following day (R. III, 100–101). Petitioner admitted giving 10 of the tablets to Burris on January 5, 1963, on the promise that Burris would replace them the next day. Petitioner testified that he refused the offer of Snokhous to pay $20 for the tablets (R. III, 102–103).

In rebuttal, Burris denied that he had permitted petitioner to keep 70 dilaudide tables as security for his promise to introduce petitioner to some doctors (R. III, 131).

## ARGUMENT

1. After the direct examination of petitioner, the prosecutor in chambers asked whether petitioner intended to offer entrapment as a defense (R. III, 105–106). The court stated that "there is evidence in this record right now from which [petitioner] could request an instruction on entrapment," but declined to interfere with the decision of petitioner's counsel to remain silent on whether he would rely on entrapment (R. III, 107). Later, when the court was considering proposed instructions, petitioner's counsel asked for the "stock instruction on entrapment," and the court announced that this request would be granted (R. III, 133). Counsel for both sides stated that they had no objection to the court's usual entrapment instruction (R. III, 138), and it was included in the court's final charge (R. III, 145–147). There was thus no contention at the trial that the evidence showed entrapment as a matter of law.

Nor does the evidence support any such contention. The government agents merely afforded petitioner an opportunity to make the sale, an act which he did willingly and voluntarily. See *Lopez* v. *United States,* 373 U.S. 427. Testimony shows that, at the time Burris was originally introduced to petitioner, petitioner was interested in narcotics. As to the sale charged in the indictment, Burris, an informer, telephoned petitioner and asked petitioner if he would supply him dilaudide tables. In reply, petitioner stated that he could supply the tablets. When Burris and agent Snokhous arrived at petitioner's home shortly thereafter, petitioner immediately made the sale without persuasion. The whole transaction took only five minutes (R. II, 63). On this record, the court did not err in submitting the question of entrapment to the jury. See *Masciale* v. *United States,* 356 U.S. 386; *Vinyard* v. *United States,* 335 F. 2d 176, 183 (C.A. 8).

2. The claims of error at the trial—which are not specified in the petition for a writ of certiorari but are apparently those relied upon below—are without substance.

*a.* On redirect examination, Burris testified that before he first met petitioner, Clift had already told him that petitioner was in the market for some narcotics. Petitioner's counsel asked for a mistrial on the ground that this was hearsay and requested a proper instruction. This colloquy then ensued (R. II, 31–32):

> The COURT. I will the best I can, and if I am incomplete in it call it to my attention.

> The statement just made by the witness that he had previously been informed by some party to what effect that he was on the lookout for some narcotics is improper because it is hearsay. It should not be considered by this jury for any reason or any purpose whatsoever, and the remark is stricken from the record.
>
> Mr. HOLT [petitioner's counsel]. At this time, for the sake of the record, I would like to make a motion for a mistrial.
>
> The COURT. Overruled.

The court's instruction to disregard this testimony was adequate to prevent prejudice to petitioner without granting a mistrial. The evidence added little, if anything, to petitioner's own testimony indicating that he had been in the market for narcotics.

*b.* Burris testified on redirect examination that, while the parties were returning from Mississippi to Little Rock, he saw petitioner take two hypodermic shots. When he started to describe them, this colloquy occurred (R. II, 41–42):

> Mr. HOLT. If the Court please, he is not being charged for taking a shot.
>
> The COURT. No, I know he is not.
>
> Mr. HOLT. This is for the purpose of aggravation, if anything.
>
> Mr. DAVIS [government attorney]. Your Honor, the defense counsel opened the inquiry——
>
> The COURT. Well, he said he took two shots. How he took them I think is immaterial. The jury understands I am sure. If not, I'll tell them. He is not charged with taking dope. He is charged with selling dope.

> Mr. DAVIS. The Government would request an instruction on that.
>
> The COURT. All right.

On recross-examination by petitioner's counsel, Burris testified that he heard Moore say to petitioner, regarding a narcotics shot, "Why shoot in the muscle? The vein is a better flash" (R. II, 52). This testimony, which was consistent with petitioner's own subsequent testimony that he was a user of narcotics, was relevant to the issue of entrapment. The trial judge placed the evidence in proper perspective by making clear that petitioner was not being tried for taking the shots. Moreover, government counsel asked for an instruction limiting use of evidence concerning other offenses, but petitioner objected and no instruction was given. Therefore, petitioner can hardly complain about the possible prejudicial effect of this evidence.

*c.* After the closing arguments the following colloquy occurred out of the hearing of the jury (R. III, 138–139):

> Mr. HOLT [petitioner's counsel]. I would like to make a Motion for a Mistrial at this time on the statement of counsel in his argument that "we have not charged him with the crime of buying in Mississippi" or words to that effect. I don't remember the exact phrasing applied to the commission of the crime in Mississippi.
>
> The COURT. Well, the record would show that this Motion was made after the completion of the arguments. It will be denied.

Since the evidence as to the trip to Mississippi was in the case as part of the background of the sale

charged, there was nothing improper in the prosecutor's statement making clear that this was not the crime charged.

3. Petitioner assigns error in the court's refusal to give an instruction he had requested. The proposed instruction was that, if petitioner "had drugs in his possession * * * only because he was keeping them for another person, and that subsequently he returned the drugs, or a portion thereof, to the person for whom he was keeping the drugs," there was no offense under either of the two counts in the indictment (R. III, 137–138). Both counts of the indictment charged an unlawful narcotics sale to Snokhous for $20 (R. I, 2), and the court's instructions clearly stated that a finding of guilty under either count required the jury to find such sale (R. III, 142, 144). As the court below observed (see Pet. 13), even if Burris or Moore had some title or interest in the narcotics in petitioner's possession and petitioner was holding the narcotics for one of them, this was not a defense if petitioner actually did sell the narcotics to Snokhous.

In short, the instruction asked by petitioner would have required the jury to make an irrelevent finding. The trial court therefore properly refused to give it.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, Jr.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

JANUARY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965